Supreme Court, U.S.
FILED
SEP - 4 2015
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No. 14-232

In the Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,
Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEE SECRETARY OF STATE MICHELE REAGAN IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

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INTRODUCTION

Arizona Secretary of State Michele Reagan submits this brief in support of the Appellants and urges the Court to reverse the decision below. The Secretary's predecessor, Ken Bennett, was named as a defendant in this action but did not participate in the trial court proceedings and did not take a position on the constitutionality of the 2011 Arizona legislative redistricting plan. Having the benefit of factual findings by the district court (which the Secretary does not contest), the Secretary believes that the lower court committed multiple errors of law in upholding the plan. The Secretary believes that the plan violates the rights of tens of thousands of Arizona voters by discriminating against residents of some legislative districts in favor of others, without any legitimate government purpose. As an appellee in this matter, the Secretary is "entitled to file documents in this Court," Sup. Ct. R. 18.2, and pursuant to Supreme Court Rule 25.1, the Secretary files this brief in support of the Appellants' position.

The Court should reaffirm the Fourteenth Amendment guarantee that a state's legislative districts be free "from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). In the latest redistricting cycle, the Arizona Independent Redistricting Commission ("IRC") redrew districts for both chambers of the Arizona legislature. As part of that process, it classified multiple districts as potentially qualifying as "ability-to-elect" districts for preclearance purposes under Section 5 of the Voting Rights Act. The IRC proceeded to "strengthen" these districts in an unusual and suspect way: it

intentionally under-populated them and, in doing so, deliberately enhanced the weight of some Arizona citizens' votes at the expense of others' votes. This conscious effort at inequality resulted in a pattern of deviations from the ideal population that falls squarely along political, racial, and ethnic lines. Appellants maintain that the IRC's actual motive for creating these deviations was to obtain Democratic partisan advantage. The IRC denies this charge.

In the Secretary's view, the choice to under- and over-populate electoral districts itself created the constitutional infirmity. Because all enfranchised Arizona citizens are similarly situated with respect to their right to vote, the IRC was obligated to accord their votes equal treatment. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Although this obligation does not require "mathematical exactitude" in equalizing district populations, it does require a process "that does not automatically discriminate in favor of certain districts." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 (1970). The IRC, to be sure, had substantial discretion in pursuing neutral redistricting goals. Incidental departures from the ideal population could be justified if necessary to a consistent, nondiscriminatory pursuit of those goals. But a redistricting goal is not "neutral" when it involves the deliberate decision to enhance the voting strength of some districts—and therefore some voters—at the expense of others. The deviations here were not incidental, and therefore the IRC's goals were not neutral.

Nor does Section 5 of the Voting Rights Act justify the deviations. The IRC had multiple tools at its

disposal for protecting Arizona's minority voters, but intentionally under-populating "ability-to-elect" districts was not among them. A statute cannot command a state to violate the Constitution. In addition, Section 5 draws its life from Congress's enforcement authority under the Fourteenth Amendment and is limited to "the letter and spirit" of Fourteenth Amendment guarantees. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (quotation marks omitted). A statute that required or authorized systemic under- and over-population of electoral districts would create "a preferred class of voters" in violation of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 558.

The text of Section 5 is consistent with that limitation and does not promise enhanced voting strength to members of a protected class. The Department of Justice enforcement guidelines confirm (as they must) that the one-person, one-vote principle supersedes all of Section 5's requirements. And, if anything, the IRC's Section 5 defense creates an additional constitutional concern because, under the IRC's version of events, the under-populated districts were selected for preferred treatment because of their racial and ethnic composition.

All of this boils down to one simple principle: intentional voter inequality is not a "tool" for states to use in furtherance of districting goals—*any* districting goals. The Court now has the opportunity to reaffirm that principle. It should do so and reverse the decision below.

STATEMENT

A. The People of Arizona Create a Redistricting Commission

The Arizona Constitution vests the state's lawmaking authority "in the legislature, consisting of a senate and a house of representatives."[1] Ariz. Const. art. 4, pt. 1, § 1(1). The senate is composed of thirty members, one elected from each of thirty legislative districts. Ariz. Const. art. 4, pt. 2, § 1(1). The house of representatives is composed of sixty members, two elected from each of the same thirty legislative districts. *Id.*

The Arizona Constitution requires that the thirty legislative districts be redrawn every ten years. *Id.* pt. 2, § 2(2). In 2000, Arizona voters amended the Constitution by a ballot initiative. The initiative removed authority for redistricting from the state legislature and vested it in an Independent Redistricting Commission ("IRC"). Last term, the Court upheld the provision from a legal challenge under Article I, Section 4 of the federal Constitution. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

The IRC is convened for redistricting every decade, by "February 28 of each year that ends in one." Ariz. Const. art. 4, pt. 2, § 2(2). Five Arizona citizens serve as commissioners on the IRC. No more than two

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[1] The Arizona Constitution reserves the power of the Arizona voting public "to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the legislature." Ariz. Const. art. 4, pt. 1, § 1(1).

commissioners may be from the same political party. All of the commissioners are selected from slates of candidates–one Republican slate, one Democratic slate, and one unaffiliated slate. Jurisdictional Statement Appendix ("JSA") 13a.

The IRC adopted its first redistricting plan in November 2001. At the time, Arizona was subject to the preclearance requirement of Section 5 of the Voting Rights Act. *See* 40 FR 43746 (1975). The 2001 plan did not receive preclearance from the U.S. Department of Justice.[2] The Department of Justice's objections concerned proposed alterations to benchmark legislative districts that would result in a drop in the percentage of Hispanic voting age population in the IRC's proposed replacement districts. For instance, the Department of Justice expressed concern about benchmark district 22, which contained a Hispanic voting age population of 65% and which the IRC proposed to split into two districts, both with lower percentages of Hispanic voting age residents. The Department of Justice also objected to alterations to benchmark district 23, containing a Hispanic voting age population of 72.2%, which the IRC proposed to combine with other districts into a new district with 43.6% Hispanic voting age population. The Department of Justice did not object to any districts on the basis of their total population deviation from the ideal (it did not so much as mention population deviations), and it did not suggest that any districts

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[2] *See* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Lisa T. Hauser and Jose de Jesus Rivera (May 20, 2002), *available at* http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020520.pdf.

should be intentionally under- or over-populated to comply with Section 5.

The IRC passed another redistricting plan. That second plan, however, was challenged in state court on state-law grounds and invalidated by an Arizona trial court. The IRC adopted another revised plan that was adopted for the 2004 through 2010 elections.[3] That map had a total population deviation of 3.12%.[4]

B. The IRC Convenes for the 2011 Redistricting Cycle

The IRC was convened again in 2010 to execute its constitutional obligation of creating new legislative districts of equal population. The two Republican commissioners appointed for the 2010 cycle were Scott Freeman and Richard Stertz, the two Democratic commissioners were Jose Herrera and Linda McNulty, and the fifth commissioner was Colleen Mathis. As the unaffiliated member of the commission, Ms. Mathis served as the IRC's chairwoman. JSA 13a–14a.

The Arizona Constitution requires the IRC to begin the mapping process by creating a so-called grid map with "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. 4, pt. 2, § 1(14). The

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[3] In 2009, the Arizona Supreme Court held that the revised IRC plan did not violate state law. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 208 P.3d 676, 689 (Ariz. 2009).

[4] Population deviations in the second IRC plan are available at the Arizona Independent Redistricting Website, Court-Ordered Map and Tests (approved April 12, 2004), http://azredistricting.org/2001/2004newlegtests/batch7/April%2012%20Adopted%20stats.pdf.

commissioners understood this provision to require that they "begin with a clean slate," without carrying over the cores of districts from the past redistricting cycle. JSA 19a. The IRC chose to create two alternative grid maps, one beginning at the center of the state and moving out counterclockwise, and the other beginning in the southeast corner of the state moving inwards and clockwise. After the alternatives were complete, the IRC voted to adopt the second alternative, which did not have districts of "equal population." *Id.* The overall population deviation was 4.07%. *Id.*

Following adoption of the "grid map," the IRC began the process of adjusting the map, with the goal of producing a "draft map" to be published for public comment. Adjustments were to be made "as necessary" to accommodate the following goals: (a) compliance with the U.S. Constitution and the Voting Rights Act; (b) equal population across districts; (c) compact and contiguous districts; (d) respect for communities of interest; (e) use of geographic features when drawing; and (f) competitive districts.[5] JSA 24a; Ariz. Const. art. 4, pt. 2, § 1(14).

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[5] The IRC did not define or expound on the meaning of compactness, contiguous, communities of interest, or competitiveness. JSA 157a–160a.

The draft plan that emerged from this process had a total population deviation of 5.6%.[6] The most under-populated district in the plan was Republican-leaning District 23 (-3.0%). The IRC's consultants and legal counsel believed that the map contained ten minority ability-to-elect districts (nine Hispanic and one Native American). JSA 28a; *see also* JSA 12a. The minority district with the population deviation furthest below the ideal was District 30, at -2.4%. On October 10, 2011, the IRC approved of the draft map by a vote of 4-1 and published the map to the public for a thirty-day comment period. JSA 28a.

During the comment period, the IRC engaged an expert, Dr. Gary King of Harvard University, to perform an analysis of the draft plan to ensure compliance with Section 5's non-retrogression requirement. JSA 26a. Dr. King determined that "minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map." JSA 30a.

C. The IRC "Strengthens" Ability-To-Elect Districts by Intentionally Under-Populating Them

At the conclusion of the thirty-day public comment period, the IRC began preparing the final map that would be submitted to the Department of Justice for preclearance. The IRC concluded that ten minority

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[6] The population deviations discussed here for the draft map are available at the Arizona Independent Redistricting Website, Draft Maps (Approved Oct. 10, 2011), http://azredistricting.org/Maps/Draft-Maps/LD/Commission%20Approved%20Legislative %20Draft %20Map%20-%20Population%20Data%20Table.pdf.

ability-to-elect districts would likely be sufficient to obtain preclearance but received advice from its legal counsel and consultants to "strengthen them if there is a way to strengthen them." JSA 30a (internal quotation marks omitted).

The method chosen to "strengthen" the minority districts was to shift portions of their population to other districts. The IRC was advised "that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." JSA 30a. According to the IRC's advisors, "underpopulating districts to increase the proportion of minorities was an 'accepted redistricting tool' and something that the Department of Justice looked at favorably when assessing compliance with Section 5." JSA 30a.

At trial, IRC Commissioner Richard Stertz described the process: "By virtue of advice from counsel and their consultant . . . it was the opinion of our team that we needed to strengthen the [minority] districts. And to strengthen the districts, underpopulating those districts was an acceptable mechanism to do so." JSA 174a. The IRC was aware that under-populating minority districts meant over-populating other districts and that the resulting population deviations would have a partisan pattern: "to underpopulate those districts, other districts needed to become overpopulated. And by strengthening those districts, you offload Republicans from one district to another; therefore, overpopulating Republican districts and underpopulating the Democrat districts." JSA

174a.[7] In the process, the IRC removed even minority residents from the districts, often resulting in a decrease of minority voting age population in minority districts. JSA 165a–167a.

The IRC implemented multiple alterations to the final map in its effort to reduce population in the class of districts labeled "ability-to-elect" districts. That is self-evident from the deviation shifts in Districts 2 (-0.1% to -4.0%), 3 (-1.4% to -4.0%), 4 (0.5% to -4.2%), 7 (-1.3% to -4.7%), 19 (-0.5% to -2.8%), 24 (0.2% to -3.0%), 27 (-2.2% to -4.2%), 29 (-0.4% to -0.9%), and 30 (-2.4% to -2.5%). *See supra* note 6. The only district

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[7] *See also* JSA 171a (Commissioner Stertz testifying that the IRC "received advice from counsel . . . that it was okay to underpopulate districts in order to strengthen them as districts in which minorities could elect their preferred candidates"); JSA 169a–170a (Commissioner Stertz testifying that changes "took population out of . . . districts weaken—in my opinion, weakening those, and packed a lot of prison population in . . . . So [District] 8 became a very contrived district that was created at the very end"); JSA 39a–40a (finding that "[a]fter the draft map was completed, both Republican commissioners expressed concern about further depopulating minority ability-to-elect districts" and that the IRC continued depopulating them); Motion to Dismiss Appendix ("MTDA") 30–31 (redistricting record reflecting advice of counsel that "there have been jurisdictions that I've worked with in this redistricting cycle where the majority-minority districts[']deviation was higher . . . because we intentionally under-populated in order to comply with Section 5"); MTDA 35 (redistricting record reflecting change "to reduce the deviations that are in the map, other than the voting rights district"); Joint Appendix 169a–170a (Commissioner Herrera stating that the Voting Rights Act trumps "pretty much everything" and that "if it means moving blocks of people to different districts . . . that their vote may not be or their district may not be as competitive . . . then that's what we have to do").

classified by the IRC as an "ability-to-elect" district that did not fall in population deviation between the draft and final maps was District 26, which moved negligibly from 0.1% to 0.3%. JSA 32a.

In addition, the IRC intentionally under-populated District 8, which fell from 1.5% above the ideal to 2.2% below it. JSA 9a, 34a. According to the district court, the occasion for this change was a suggestion by Commissioner McNulty that the district should be made more competitive. JSA 32a. The IRC's consultants proposed changes to the population deviation, and this sparked opposition from the two Republican commissioners, who complained that the changed favored Democratic interests and "hyperpack[ed]" Republicans into District 11. JSA 32a. At that point, an IRC consultant opined that under-populating District 8 might allow the IRC to present it as an additional ability-to-elect district. JSA 33a. The district court found that "[t]he Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects," and that "Commissioner McNulty did not propose any corresponding effort to make any Democratic-leaning districts more competitive." JSA 32a. The IRC voted 3-2 to adopt changes to District 8, with the Republican commissioners voting against. JSA 33a–34a.

The changes to District 8 increased population deviations in that district and in a number of neighboring districts. JSA 34a. The changes split the political subdivision of Casa Grande in half, cut across an interstate highway, and captured a significant amount of prison population, but did not make the district more competitive. JSA 169a–170a. The IRC

did not present District 8 to the Department of Justice as an ability-to-elect district. JSA 9a, 34a. The district judges were divided as to what motivated the alteration in District 8's population deviation, *compare* JSA 42a *and* JSA 107a–108a, 113a *with* JSA 96a–104a, but the court's findings are clear: the change was intentional. In making these changes and others, the IRC did not consider whether it could create performing Section 5 districts in a plan with substantially equal population. At trial, Judge Wake asked Commissioner Freeman about the IRC's efforts to attain districts of equal population:

> Judge Wake: I have one question, Commissioner. Did the Commission ever draw a plan trying to approach equal population to see how it would play out for non-retrogression?
>
> The Witness: No.

JSA 208a. To the contrary, the IRC intentionally drew districts of unequal population. And, as the IRC represented in its motion to dismiss this appeal, the "consequence" of its decision "[t]o underpopulate an ability-to-elect district . . . often would be to remove population from districts that had a higher proportion of voters who were registered Democrats." Motion to Dismiss at 12–13. Thus, there was a systematic shift upwards in the population deviations in Republican-leaning districts, including in Districts 1 (-2.4% to 1.6%), 5 (-2.1% to 2.8%), 12 (1.7% to 4.1%), 14 (-0.2% to 2.2%), 16 (1.9% to 3.3%), 17 (0.2% to 3.8%), 18 (1.4% to 2.6%), 21 (0.0% to 1.5%), 22 (-1.4% to 1.3%), 23 (-3.0% to 0.2%), 25 (1.8% to 3.6%), and 28 (0.4% to 2.6%). *See supra* n.6; JSA 9a–10a. The district court found it "highly likely that the members of the Commission

were aware of this correlation" between race and political affiliation. JSA 38a. The district court found that the IRC's intentional deviations from equality were "predominantly motivated" by its desire to comply with the Voting Rights Act. *Id.* But it recognized, consistent with the indisputable numbers, that the inequality was systematic. JSA 11a–12a.

D. The Final Map Exhibits an Unmistakable Pattern of Under- and Over-Population Along Racial/Ethnic and Political Lines

The IRC adopted the final map on January 17, 2012, by a 3-2 vote, with both Republican commissioners voting against the map. JSA 35a. The overall deviation of the final map is 8.8%. JSA 112a. With one exception, every district with higher Republican registration than Democratic registration is over-populated, and all but two of the districts with higher Democratic registration than Republican registration are under-populated. JSA 221a–222a. On average, the 11 under-populated Democratic districts are under-populated by 3.03%. JSA 222a. Out of the thirty districts, eighteen have population deviations greater than 2% from the ideal population. *See* JSA 9a–10a; JSA 221a–222a. Of those eighteen, the under-populated districts are all Democratic-plurality districts, and the over-populated districts are Republican-leaning districts. Multiple Democratic-plurality districts push the lower bounds of that deviation range, including Districts 2 (-4.0%), 3 (-4.0%), 4 (-4.2%), 7 (-4.7%), and 27 (-4.2%). JSA 9a–10a. Multiple Republican-leaning districts push the upper bounds of that range, including Districts 12 (4.1%), 16 (3.3%), 17 (3.8%), and 25 (3.6%). *Id.* This was not

inevitable: over-populated districts border on under-populated ones, including District 14 (+2.2%), which borders Districts 2 (-4.0%), 8 (-2.2%), and 10 (-0.9%); and District 28 (+2.6%), which borders Districts 24 (-3.0%) and 30 (-2.5%).[8] *Id.*; Supplemental Appendix SA56.

The population deviations also correlate with the racial and ethnic composition of Arizona's legislative districts. All but one of the ten districts presented to the Department of Justice as ability-to-elect districts are under-populated, nine by more than two percent, and five by four percent or greater. JSA 9a–10a.

At trial, the expert for the Appellants produced an alternative map with deviations ranging from 0.19% above the ideal to 0.19% below it, for a total population deviation of 0.38%. JSA 237a. The alternative plan had enough districts in which the minority population had the ability to elect its preferred candidates for the plan to obtain preclearance under Section 5. JSA 230a–232a. A plan of equal population can satisfy Section 5, and it would be administrable by the Arizona Secretary of State.

On February 28, 2012, the IRC submitted its plan to the Department of Justice. The Department of Justice approved the map on April 26, 2012. JSA 35a.

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[8] These numbers are based on the metric of total population, which the IRC used as the basis for determining its population deviations. Under the rubric of citizen voting age population, the deviations for all districts are much wider, running from 28.98% below the ideal to 25.83% above the ideal. JSA 243a–244a. The total deviation is 54.81%. *Id.* *See Evenwel v. Abbott*, No. 14-940 (2015).

E. The Proceedings Below

The Appellants (they were plaintiffs below) are residents of the districts with population deviations above the ideal. They filed this case on April 27, 2012, alleging that the systematic over-population of their districts—the consequence of the systematic under-population of Democratic plurality districts—violated their equal protection rights. Named defendants included the IRC, the IRC commissioners, and then-Arizona Secretary of State Ken Bennett. Mr. Bennett did not participate in the proceedings below, and he did not take a position on the validity of the IRC's plan or the Appellants' claims.

A three-judge court was convened pursuant to 28 U.S.C. § 2284 (Circuit Judge Clifton and District Judges Silver and Wake). The court presided over a five-day bench trial at the end of March 2013. The court issued a *per curiam* decision on April 29, 2014, with Judges Clifton and Silver voting to reject the Appellants' challenge.

The court placed the burden of proving that the population deviations in the IRC's plan were not justified on the Appellants. The court declined to apply strict scrutiny, despite the racial and ethnic classifications used to identify districts for under-population, because "this is not a racial gerrymandering case." JSA 64a. The court determined that, in the one-person, one-vote context, the burden of proof falls on the party challenging a deviation of under five percent and that it would not "import[] strict scrutiny into the one-person, one-vote context." JSA 64a.

The court assumed, without deciding, that the motive of obtaining partisan advantage "is not a valid justification for departing from perfect population equality." JSA 62a. Judges Clifton and Silver were unable to agree upon a standard to apply "when population deviations result from mixed motives, some legitimate and some illegitimate." JSA 62a. The court assumed, without deciding, that the Appellants could prevail by showing that "illegitimate criteria predominated over legitimate criteria." JSA 63a–65a & n.10.

The court proceeded to conclude that compliance with the Voting Rights Act "is among the legitimate redistricting criteria that can justify minor population deviations" from perfect equality. JSA 65a. The court reasoned that "compliance with a federal law concerning voting rights" must be a legitimate basis for deviation from population equality when multiple state policies, such as "protecting incumbent legislators," may justify deviations. JSA 66a. The court acknowledged that the Voting Rights Act does not purport to authorize population deviations, but found that "a state might improve its chance of obtaining preclearance by presenting a plan that includes minor population variances." JSA 68a n.11. The court cited the Department of Justice's guidelines on redistricting, which provide that alternative plans for protecting minority voters will not be considered if they "'would require *significantly* greater overall population deviation'" than the proposed plan, and it concluded that the Department of Justice may consider alternative plans if the deviations are modest. JSA 69a (quoting Guidance Concerning Redistricting under

Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)).

Having concluded that compliance with the Voting Rights Act is a legitimate policy justifying population deviations, the court determined that this motive justified the deviations in the IRC's plan. JSA 73a–80a. Again, Judges Clifton and Silver were unable to agree on the details: Judge Clifton concluded that partisanship was a motive in the IRC's decision to under-populate some districts, but not the predominant motive, and Judge Silver maintained that there was insufficient evidence to conclude "that anyone set out to harm the Republicans." JSA 78a–80a; JSA 96a–104a.

Judge Silver wrote a concurring opinion addressing issues left open in the *per curiam* decision. She opined that partisanship likely can be a legitimate justification of population deviations. JSA 88a–93a. She also opined that the applicable standard should be whether the *sole* reason for the population deviations is illegitimate and that the case should not turn on a "predominance" test. JSA 93a–96a.

Judge Wake concurred in part, dissented in part, and dissented in the judgment. JSA 105a–145a. He asserted that the case concerns "systematic population deviation for Democratic Party benefit." JSA 106a. According to Judge Wake, "arbitrariness and discrimination disqualify even 'minor' population inequality within 10%." JSA 116a. State goals "legitimately may be pursued, but not by population inequality." JSA 117a. That principle rules out partisan advantage as a justification for population inequality, at least if it is systematic. JSA 117a–121a.

Judge Wake acknowledged that not all forms of partisan motive in redistricting are subject to judicially manageable standards, but found that this case "is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone." JSA 120a. "The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not." JSA 120a. Judge Wake concluded that the Voting Rights Act purports neither to authorize nor require systematic voter inequality and cannot justify the deviations in the IRC's plan. JSA 122a–124a.

Judgment was entered on April 29, 2014. Appellants filed a timely notice of appeal on June 25, 2014. The Court noted probable jurisdiction on June 30, 2015, and set this case for briefing and oral argument.

SUMMARY OF ARGUMENT

The district court erred in concluding that the IRC's legislative redistricting plan satisfies the equal protection guarantee of electoral districts with substantially equal population. The court's factual findings reveal that the IRC under-populated multiple legislative districts in the plan and that it did so intentionally. The Appellants contend that this decision was motivated by partisanship, and the IRC contends that it was motivated by considerations of race and ethnicity.

Both motivations are illegitimate. Indeed, no motive for deliberately under- or over-populating legislative districts is permissible because any "built-in bias" towards inequality "in favor of certain districts"

conflicts with the state's duty to treat all its citizens equally. *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50, 57–58 (1970). The Equal Protection Clause obligated the IRC to "adhere[] to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). The district court's factual findings indicate that the pattern of over- and under-population, which falls unmistakably along political and racial and ethnic lines, was what it appeared to be: the conscious choice to prefer one class of citizens over another. The deviations were not the result of "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. The plan therefore cannot survive constitutional scrutiny.

The IRC maintains that Section 5 of the Voting Rights Act justifies its decision to identify voting districts for under-population according to their racial and ethnic composition. The district court erred in ratifying that view. Section 5 of the Voting Rights Act contains no requirement that a state discriminate against its citizens by diluting their voting strength on any basis. In fact, the text of Section 5 disclaims any interpretation that would give members of a protected class the right to representation greater than, or even equal to, their proportion of the population.

But even if Section 5 expressly contained a command to under-populate districts, the IRC could not have taken this course of action because the Constitution is supreme—and the Constitution forbade

the IRC from creating a "preferred class of voters." *Reynolds*, 377 U.S. at 558. Accordingly, neither Congress nor the Department of Justice was able to require a discriminatory plan of intentional vote dilution. Moreover, a Section 5 command of inequality would be unconstitutional because Section 5 depends on the affirmative grant of authority of the Fourteenth Amendment for legitimacy. The Fourteenth Amendment, however, "amply provides for the protection of minorities by means *other than* giving them" enhanced voting strength. *Reynolds*, 377 U.S. at 566 (emphasis added). Congress cannot "enforce a constitutional right by changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Besides, the IRC's Voting Rights Act defense raises *additional* constitutional concerns. Even if some classifications were appropriate for distinguishing citizens with respect to the value of their votes, race and ethnicity could not be among them. *See Gray v. Sanders*, 372 U.S. 368, 379 (1963). The IRC departed from legitimate racial considerations in redistricting, such as in identifying cohesive racial or ethnic communities of interest or in drawing districts with a sufficient percentage of racial minorities to ensure that the minority community has the ability to elect its preferred candidates. The Secretary supports the use of race for both of those purposes. But neither purpose requires a state to discriminate against its own citizens by tampering with the relative weight of their votes.

The district court therefore sanctioned two violations of the Fourteenth Amendment, and reversal is necessary to correct its legal errors. The Court should order the district court to enter judgment for the

Appellants and remand for the entry of appropriate relief.

ARGUMENT

I. A State May Not, Consistent with Equal Protection, Identify Legislative Districts for Over- and Under-Population Based on Any Classification of Its Voters

The Equal Protection Clause of the Fourteenth Amendment guarantees "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565–66. It guarantees "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.* at 576. It "demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.* at 568.

Inequality of voting power is no small matter: "the rights allegedly impaired are individual and personal in nature"; "the right of suffrage is a fundamental matter in a free and democratic society"; and, hence, this case "touches a sensitive and important area of human rights, and involves one of the basic civil rights of man." *Id.* at 561 (internal quotation marks omitted). "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. That includes alleged deviations from equality of voting power in crafting state legislative districts. *Id.* at 568.

It is undisputed that the IRC did not draw districts of equal population. It is indisputable that the population deviations in the IRC's plan are not random or incidental. They exhibit an unmistakable pattern,

and it is highly unlikely that this occurred by happenstance. As probative as this circumstantial evidence is, direct evidence confirms that the IRC intended this pattern: IRC commissioners admitted at trial that they intentionally under-populated a class of districts; the district court found that they did; and the IRC, as recently as its motion to dismiss, reaffirmed that this occurred.

Those facts are sufficient for reversal. Equal protection requires that state legislative districts be "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. ."[D]ivergences" from mathematical equality are allowed only if they result from "legitimate considerations incident to the effectuation of a rational state policy." *Gaffney v. Cummings*, 412 U.S. 735, 742 (1973) (internal quotation marks omitted). And a policy is only rational if it is "free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). In short, a state cannot make "an honest and good faith effort" at equal districts by trying to make them unequal. *Reynolds*, 377 U.S. at 577. That occurred here.

A. The Equal Protection Clause Requires a Good-Faith Effort to Attain Districts of Equal Population

Mathematical equality of districts in a state legislative plan is the ideal. *Reynolds*, 377 U.S. at 577. But it need not necessarily be the outcome for the equal protection guarantee to be satisfied. *Roman*, 377 U.S. at 710. Indeed, the "constitutionally permissible bounds of discretion in deviating from apportionment according to population" cannot be "state[d] in mathematical language." *Roman*, 377 U.S. at 710; *see*

also Reynolds, 377 U.S. at 577 ("Mathematical exactness or precision is hardly a workable constitutional requirement.").[9]

Instead, the correct "judicial approach" is to evaluate the *process* by which the plan was produced. *See Roman*, 377 U.S. at 710. The relevant question is whether "there has been a faithful adherence to a plan of population-based representation." *Id.* Under that standard, "minor deviations" from mathematical equality are permissible, but "only as may occur" under a plan "free from any taint of arbitrariness or discrimination." *Id.* Thus, although a state may fail to achieve the ideal of mathematical equality and although such a failure may permissibly be the incidental result of a state's efforts to achieve other goals, mathematical equality must be the "overriding objective." *Mahan*, 410 U.S. at 984. The requirement remains, in all instances, "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577.

A state's departure from the mandate to pursue mathematical equality is not difficult to identify.

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[9] In contrast to the rules governing congressional reapportionment, the Court has not demanded justification for deviations from absolute mathematical equality of state legislative or local redistricting plans in all instances. *See Mahan v. Howell*, 410 U.S. 315, 323 (1973). The difference follows, in part, from unique state districting interests, especially those inherent in the relationship between state and local governments. *See id.* at 321–22; *see also id.* at 982–83 (upholding a districting plan where "it was impossible to draft district lines" along political-subdivision lines and, at the same time, achieve mathematical equality).

Population inequality, after all, is obvious from census numbers. *See Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004). A plan with large population deviations therefore presents a prima facie case of discrimination; that is, it can be assumed that the state failed to make a good-faith effort at equality if the districts are substantially unequal. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). Thus, the burden of "justification" falls on the state, which must show that the deviations were the direct result of a "rational state policy" and do not "exceed constitutional limits." *Id.* (internal quotation marks omitted). "[M]inor deviations" from equality, meanwhile, are facially consistent with a good-faith effort at equality and therefore "are insufficient to make out a prima facie case of invidious discrimination." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[J]ustification by the State" is not required as to such deviations—unless there is further evidence of discrimination. *Id.* at 745, 751–52. "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Voinovich*, 507 U.S. at 161 (internal quotation marks omitted).

But this burden-shifting framework—sometimes called the ten percent rule—does not eviscerate the equal protection guarantee of non-discriminatory districting. This framework merely "serves as the determining point for allocating the burden of proof." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996).[10] The

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[10] *Accord Larios v. Cox*, 300 F. Supp. 2d 1320, 1340 (N.D. Ga. 2004); *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311–12 (E.D.N.Y. 2003); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1285–86 (S.D. Ala. 2002); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041,

underlying requirement "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," *Reynolds*, 377 U.S. at 577, remains applicable, even to plans with a total population deviation of less than ten percent.

B. The Intentional Over- or Under-Population of Legislative Districts Is the Antithesis of a Good Faith Effort to Achieve Equality

The district court failed to hold the IRC to this good-faith standard. The court determined that "plaintiffs must prove that the population deviations were not motivated by legitimate considerations or, possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations." JSA 35a–36a. This standard assumes that there may be legitimate motives for systematic dilution and enhancement of the weight of votes across Arizona, depending on each voter's district of residence.

That cannot be. The "Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). In fact, the Court has never identified *any* interest—political, geographic, racial, or otherwise—as being so entitled. From its earliest decisions interpreting the Fourteenth Amendment, the Court has required that "the law deal[] alike with all of a certain class" of a state's

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1047 (S.D. Ill. 2001); *Abate v. Rockland County Legislature*, 964 F. Supp. 817, 819 (S.D.N.Y. 1997); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994).

citizens. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897). State classifications of citizens "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 190–91 (1964). As to the act of voting, "all voters, as citizens of a State, stand in the same relation" as other citizens. *Reynolds*, 377 U.S. at 565–66. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. Because the enfranchised citizens of Arizona are all similarly situated, there is *no* basis for drawing classifications between and among them in order to intentionally enhance some votes and dilute others. *See id.* This principle rules out most, if not all, "suggested criteria for differentiation of citizens," including "place of residence," "race," and "economic status." *Id.* at 565–66. "The Concept of 'we the people' under the Constitution visualizes no preferred class of voters." *Id.* at 558.

Although this principle forbids classifying citizens for under- and over-valuing their votes, it does not rule out all—or even most—deviations from mathematical equality. A state may draw districts of unequal population, as long as deviations occur incidentally in the pursuit of other goals—*i.e.*, goals unrelated to tampering with the relative worth of votes. Legitimate goals include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). If these criteria are "nondiscriminatory" and are "consistently applied," then resulting

deviations are permissible. *Id.* Implementing a nondiscriminatory plan resulting in population deviations does not involve classifying citizens with respect to the weight of their votes. The state may have "'awareness of [these] consequences,'" but the districting decisions are made "'in spite of,'" not "'because of,'" their adverse effects. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). And the resulting deviations, lacking the guidance of a classification, will almost always be random, not follow any pattern, and not evince any built-in bias.

In contrast, a conscious effort to make districts of unequal population is antithetical to "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. If a state "cannot . . . manipulate its political subdivisions so as to defeat a federally protected right," *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 108 (1967), then it certainly cannot manipulate its legislative districts to make their populations unequal, where the Constitution demands an honest effort at equality, *Reynolds*, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. at 347) ("insulation" of state authority from judicial review ends "when state power is used as an instrument for circumventing a federally protected right"). Manipulation itself is the constitutional problem because the "equal population goal is not one factor among others" in redistricting; it is "a background rule against which redistricting takes place." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). "[I]n light of the Constitution's demands," a state is not free to use inequality as (in the district court's words) a "tool" in

furtherance of its goals. *See id.* at 1270. *Compare* JSA 36a. Equality must be the goal.

The Court, accordingly, has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors." *Abate*, 403 U.S. at 185–86. The Court encountered this form of bias in *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50 (1970), and denounced it—without considering what "motives" the state might have had for its bias. The state in *Hadley* established a formula for divvying six junior college trustee slots among various school districts. Trustees were elected at large, unless one district obtained one-third or more of the population. *Id.* at 57. If a district had more than one-third and less than half of the population, it would elect two of the six trustees, and the rest would be elected at large. *Id.* If a district had between one-half and two-thirds of the total population, it would receive three of the six trustees. *Id.* If the district had more than two-thirds, it would elect four trustees. *Id.*

This plan did "not comport with constitutional requirements" because, "while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more." *Id.* at 57. This was "built-in discrimination," and it displayed a "built-in bias in favor of small districts." *Id.* at 57–58. The case would be different, the Court said, if the deviation from equality resulted "from the inherent mathematical complications" of the apportionment—*i.e.*, if deviations

were the incidental result of non-arbitrary, non-discriminatory state objectives unrelated to tampering with the value of votes. *See id.* at 58. "[M]athematical exactitude is not required, but a plan that does not automatically discriminate in favor of certain districts is."[11] *Id.* (internal citations omitted); *see also WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (rejecting state redistricting formula that would "of necessity" dilute the votes of those living in "disfavored areas of the State").

Adoption of a discriminatory formula is not the only manner in which a state may "automatically discriminate in favor of certain districts." Where the state takes the process off auto-pilot and assumes the initiative in selecting districts for over- or under-population based on a predetermined classification, it discriminates to an equal degree. The process is as tainted by a "built-in bias" as is a process governed by a biased formula because it is directed towards inequality. *See Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (finding a violation of the equal protection one-person, one-vote guarantee where the state set a "target" deviation of ten percent, "regardless of the practicality of reaching a lower percentage of population deviation" and manipulated the leeway within that deviation to "cannibalize" certain districts on a partisan basis); *cf. Wells v. Rockefeller*, 394 U.S. 542, 546 (1969) (in congressional case, rejecting "a scheme" that "would permit groups of districts with defined interest orientations to be

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[11] Notably, the formula condemned in *Hadley* would not necessarily have resulted in deviations exceeding ten percent—or in any deviations at all.

overrepresented at the expense of districts with different interest orientations").

The Court's summary affirmance of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), confirmed this principle.[12] *Cox v. Larios*, 542 U.S. 947 (2004). The Georgia legislature in *Larios* drew a legislative plan to achieve two "expressly enumerated objectives: the protection of rural and inner-city Atlanta against a relative decline in their populations and the protection

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[12] *Cox v. Larios*, 542 U.S. 947 (2004), "is an affirmance of the [*Larios*] judgment only." *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (internal quotation marks omitted). "[N]o more may be read into [it] than was essential to sustain that judgment." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). However, the *Larios* judgment speaks volumes because it necessarily depends on the proposition that the ten percent rule is not an unassailable "safe harbor"—the adjudicated deviations being below ten percent. The judgment also depends on the proposition that none of the "justifications" offered by the state were legitimate, which rules out several potential justifications for deviations from the *Reynolds* good-faith rule. *Larios* is merely a faithful application of *Hadley* to a different form of automatic inequality in districting. *Contrast Comptroller of Treasury of Maryland*, 135 S.Ct. at 1800 ("A summary affirmance is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.") (internal quotation marks omitted). Although the Court subsequently noted that *Larios* does not "give clear guidance" on the issue of "whether or when partisan advantage alone may justify deviations in population," (internal quotation marks omitted), it suggested that *Larios* may well apply where a legislature "intentionally sought to manipulate population variances" in a redistricting plan. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 422–23 (2006) (finding reliance on *Larios* "unavailing" where there was no evidence of manipulation). That is the case here. *See infra* at I.C.

of Democratic incumbents." 300 F. Supp. 2d at 1325. But the state set out to accomplish these objectives by manipulating the relative voting strength of millions of citizens, using the ten percent rule as a *carte blanche* for intentional and systematic voter inequality along several identifiable patterns. The resulting plan had a total population deviation of 9.98%; "[t]he most underpopulated districts are primarily Democratic-leaning, and the most overpopulated districts are primarily Republican-leaning"; and the districts with negative deviations were in rural and inner-city regions. *Id.* at 1326.

The district court in *Larios* scoured the record to discern whether the deviations may, in fact, have been the product of "'a faithful adherence to a plan of population-based representation'" without "'arbitrariness or discrimination.'" *Id.* at 1341 (quoting *Reynolds*, 377 U.S. at 710).[13] But the factual record confirmed that the pattern was what it seemed: "[a]t no time did the drafters of the plans nurture the

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[13] Given the pattern of over- and under-population, the *Larios* court would have been justified in shifting the burden to the state. Just as the existence of large deviations in a redistricting plan makes it improbable that the state made a good-faith effort at equality, a pattern of over- and under-population suggests that equality was not the goal. And like a large overall population deviation range, a pattern of under- and over-population is easy to identify: as the *Larios* court observed, "[t]he numbers largely speak for themselves." 300 F. Supp. 2d at 1330. Shifting the burden would be consistent with the Court's equal protection cases. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 270 & nn.13, 21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). *See also Hulme*, 188 F. Supp. 2d at 1052.

ambition of drawing maps as close to equal in population as was reasonably practicable." *Id.* The state in *Larios* raised a series of supposed justifications, notable for their seeming resemblance to legitimate "state legislative policies," *see Karcher*, 462 U.S. at 740—except that they all were infected by bias towards inequality.

For instance, the state cited a desire to honor "regionalism" in its districting plan. This would seem to resemble a policy of drawing districts to respect "communities of interest," identified in many cases as being among a state's legitimate "traditional redistricting principles." *See, e.g., Bush v. Vera*, 517 U.S. 952, 962 (1996) (principal opinion). But Georgia's version of "regionalism" was altogether different: it entailed the deliberate decision to give rural residents additional voting strength by manipulating the population sizes of the districts and, by consequence, the weight of their votes. *Larios*, 300 F. Supp. 2d at 1343. But "states cannot seek to protect certain geographic interests by allotting them more seats in the state legislature, and thus more legislative influence, than their population would otherwise allow." *Id.* at 1343 (citing *Reynolds*, 377 U.S. at 566).[14] "Manipulating the legislative districting map to allow

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[14] In holding that "voters cannot be classified, constitutionally, on the basis of where they live" for purposes of diluting their voting strength, the Court in *Reynolds* necessarily excluded other classifications as well. 377 U.S. at 560. That is because not every voter in a district will share in the classification ("race, sex, economic status") by which the district was identified for disfavored treatment. *See id.* at 561. The residents who do not share the classification are being "classified" simply "on the basis of where they live." *Id.* at 560.

rural Georgia and inner-city Atlanta to maintain the number of seats those areas used to have is tantamount to saying that the interests of rural and inner-city voters are simply more important than those of other citizens." *Id.* at 1345.[15]

The state also cited a desire to protect incumbents. *Id.* at 1347–48. And, while the Court has recognized incumbency protection as potentially being a legitimate state policy, *Karcher*, 462 U.S. at 740–41, there was nothing "nondiscriminatory" about the state's unique application of this policy. *See Larios*, 300 F. Supp. 2d at 1347–48. As the *Larios* court correctly observed, incumbency protection typically refers to "the prevention of contests between incumbents" by careful line-drawing to avoid drawing incumbent residencies into the same district. *Id.* at 1347. But the state used the political affiliation of incumbents as the basis for over- and under-populating their respective districts: "The vast majority of districts with negative population deviations were held by Democratic incumbents, while the majority of overpopulated districts were held by Republican incumbents." *Id.* at 1347–48. Incumbency protection is not a neutral policy when it is the arbitrary basis for creating a preferred class of citizens:

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[15] Classifying citizens for enhanced voting strength is distinct from drawing residents into districts based on their shared interests. As to that latter endeavor, the Court has indicated that "age, economic status, religious and political persuasion, and a variety of other demographic factors" are permissible bases for guiding the state's redistricting decisions. *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*). These are not legitimate bases by which to distinguish citizens for enhanced and diluted votes. *See Reynolds*, 377 U.S. at 561.

those who reside in the districts represented by favored representatives. "This was the very embodiment of a state policy applied in a discriminatory and arbitrary manner."[16] *Id.* at 1348.

In short, a state objective that *sounds* like a neutral policy is not at all neutral if the state chooses systematic voter inequality as its "tool" for implementing the policy.[17] "[M]athematical exactitude is not required, but a plan that does not automatically discriminate in favor of certain districts is." *Hadley*, 397 U.S. at 57–58. Thus, in asking what motivated the IRC to under- and over-populate districts, the lower court "asked the wrong question." *Alabama*, 135 S. Ct. at 1274. The correct question is whether the IRC under-populated districts intentionally or whether the inequality resulted incidentally from the application of a rational policy entailing something *other* than inequality. *See Hadley*, 397 U.S. at 57–58; *Abate*, 403 U.S. at 185–86.

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[16] The state also argued that the deviations could be justified by traditional districting criteria, such as compactness, but there was "not even the slightest suggestion that the population deviations . . . resulted from an attempt" to apply these criteria. *Larios*, 300 F. Supp. 2d at 1350.

[17] Professors Thomas Brunell and Whitney Ross Manzo found that the *Cox v. Larios* decision has had an attenuating effect on population deviations overall as well as a reduction in the blatant partisan use of population deviations. Thomas L. Brunell, Whitney Ross Manzo, *The Impact of* Cox v. Larios *on State Legislative Population Deviations*, 13 Election L.J. 351 (2014).

C. The IRC Intentionally Over- and Under-Populated Legislative Districts

The record evidence, the IRC's admissions, and the factual findings of the district court confirm that the population deviations in the IRC's plan were not the result of a rational state policy, consistently applied. The starting point is the obvious pattern of voter inequality, categorized by the partisan and racial makeup of the districts. Of thirty districts, twelve are under-populated, and all but one of those contain more Democratic-registered voters than Republican-registered voters. JSA 221a. The fourteen most over-populated districts all contain more Republican-registered voters than Democratic-registered voters. JSA 221a–222a. The only over-populated Democratic-plurality districts (there are two) are over-populated by less than 0.3%, and the sole under-populated Republican-plurality district is over-populated by 0.64%. *Id.* Two-thirds of all districts have deviations exceeding 1.0%. Of these twenty-one districts, nine are under-populated and twelve are over-populated. All of these under-populated districts hold a Democratic edge in registration; all of these over-populated districts hold a Republican edge in registration. JSA 9a–10a. Predictably, the two Republican members of the IRC voted against the plan. JSA 35a.

The total population deviations run from 4.07% above the ideal to 4.71% below, for a total population deviation rounding to 8.8%. *Id.* Multiple Democratic-plurality districts push the lower bounds of that deviation range, including Districts 2 (-4.0%), 3 (-4.0%), 4 (-4.2%), 7 (-4.7%), and 27 (-4.2%). JSA 9a–10a. Multiple Republican-plurality districts push the upper

bounds of that range, including Districts 12 (4.1%), 16 (3.3%), 17 (3.8%), and 25 (3.6%). This was not inevitable: over-populated districts border on under-populated districts, and multiple districts saw substantial population shifts from the draft map.

This "stark" pattern is "unexplainable on grounds other than" the intentional creation of unequal voting districts. *Village of Arlington Heights*, 429 U.S. at 266 (citing, *inter alia*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). It suggests, if not proves, a "built-in bias" in the IRC's redistricting process. *Abate*, 403 U.S. at 185–86.

In the face of that clear pattern of inequality, the IRC's only viable defense was that the pattern resulted incidentally from some quirk in the interplay of Arizona's neutral redistricting goals, its geography, its political subdivision lines, and its demographics. The IRC did not raise that defense, and the trial record and the court's findings of fact confirm that the IRC's plan "automatically discriminate[d] in favor of certain districts." *See Hadley*, 397 U.S. at 57–58. As in *Larios*, "[a]t no time did the drafters of the plan[] nurture the ambition of drawing maps as close to equal in population as was reasonably practicable." *See Larios*, 300 F. Supp. 2d at 1326. The IRC received an analysis from its expert from Harvard, concluding that the ten Section 5 districts "would be able to elect candidates of their choice." JSA 30a. Yet the IRC's consultant team advised that the IRC "strengthen" those ten districts by under-populating them. JSA 30a. The IRC implemented multiple changes to that end. These shifts were not the incidental result of neutral redistricting goals: "underpopulating minority districts

was," in the IRC's view, "an acceptable *tool* for complying with the Voting Rights Act," as long as the ten percent rule was respected. JSA 30a (emphasis added).

The IRC was advised to create a "preferred class of voters," and it followed that advice. *Reynolds*, 377 U.S. at 558. The IRC shifted population in Districts 24 and 26, resulting in "an increase of population inequality." JSA 32a. It shifted population from District 8, effecting the deviations in Districts 11, 12, and 16, which became under- or over-populated along partisan lines. JSA 34a. The Republican commissioners opposed the changes, claiming their colleagues were "hyperpacking" Republicans into Republican districts, and they were "correct that the change would necessarily favor Democratic electoral prospects. . . ." JSA 32a.

Districts classified for preferred treatment in every case but one have enhanced representation in the legislature according to the IRC's design, and the sole exception—District 26—is above the ideal population by a negligible amount (0.3%). *Hadley*, 397 U.S. at 57–58. Far from being an accident, the pattern of under- and over-population was the result of "built-in bias" favoring some districts. *Id.*

None of these facts are in dispute or are disputable. And although the district court became preoccupied with what may have motivated the IRC to under-populate districts, this dispute is not germane to the central one-person, one-vote issue: whether the IRC made "an honest and good faith effort" at equal districts, *Reynolds*, 377 U.S. at 577, with deviations "only as may occur" under a plan "free from any taint

of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. The district court's findings, based on unrebutted evidence, indicate that the IRC instead made an effort at *inequality*, in violation of the equal protection rights of Arizona citizens.

II. No Statute Can Authorize or Require That a State Over- or Under-Populate Legislative Districts

The district court erred further in finding that Section 5 of the Voting Rights Act "is among the legitimate redistricting criteria that can justify minor population deviations." JSA 65a. This, again, was the wrong question. The district court approved the view that "underpopulating minority districts [is] an acceptable *tool* for complying with the Voting Rights Act." JSA 30a (emphasis added). That view is on trial here. After all, the IRC did not draw Section 5 districts and only by happenstance deviate from the ideal population. That approach would not likely produce a pattern of population deviations along racial and political lines.[18] Instead, the IRC made inequality of voting strength an objective for its Section 5 compliance strategy by identifying specific districts as "ability-to-elect" districts and going out of its way to under-populate them. JSA 30a. That is altogether different from using Section 5 as a "legitimate

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[18] As with any "neutral" principle of redistricting—and even many non-neutral principles—the state's decisions in preserving a minority group's ability to elect its candidate of choice may involve any number of changes to a district that, by consequence, will raise the population of a minority district above the ideal as often as reduce it below the ideal.

redistricting criteria that can justify minor population deviations." JSA 65a.

A. Section 5 Cannot Create a Preferred Class of Voters

No statute could require, or even authorize, intentional under-population of a class of districts. "[A] plan that does not automatically discriminate in favor of certain districts is" required by the Fourteenth Amendment. *Hadley*, 397 U.S. at 58. Congress, to state the obvious, could not require or authorize Arizona to violate the constitutional rights of its citizens. So even if Section 5 expressly stated that "covered jurisdictions shall under-populate 'ability-to-elect' districts" or that "covered jurisdictions may under-populate 'ability-to-elect' districts as a tool to comply with this Section," the requirement would be "entirely void." *See Marbury v. Madison*, 5 U.S. 137, 178 (1803).

By the same token, the Department of Justice could not, consistent with the Constitution, have enforced or interpreted Section 5 to require over- or under-populated voting districts. An unconstitutional pattern of enforcement or executive-branch interpretation of a statute is no better than a facially unconstitutional statute. *See, e.g.*, *Yick Wo v. Hopkins*, 6 S. Ct. 1064, 1068 (1886); *Stinson v. United States*, 508 U.S. 36, 45 (1993). The mere likelihood that such an interpretation would violate the Constitution would itself be grounds to reject it. *See Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) (plurality opinion). Besides, a Voting Rights Act interpretation by the Department of Justice is entitled to no deference. *Miller v. Johnson*, 515 U.S. 900, 923 (1995).

Interpreting Section 5 to require systematic voter inequality would be unconstitutional for yet another reason. "In our federal system, the National Government possesses only limited powers." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). The very legitimacy of Section 5 of the Voting Rights Act depends on Congress's power to enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *see also City of Rome v. United States*, 446 U.S. 156, 176–77 (1980).[19] Accordingly, Section 5 can only be constitutional insofar as it "is consistent with 'the letter and spirit of'" the Fourteenth Amendment. *Katzenbach*, 384 U.S. at 651 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Creating a "preferred class of voters" violates the Fourteenth Amendment. *Reynolds*, 377 U.S. at 558. Thus, although "[o]ur constitutional system amply provides for the protection of minorities," it does so "by means other than giving them majority control of state legislatures" or by enhancing the voting strength of some districts over that of others. *See id.* at 567. Congress "cannot be said to be enforcing" the Fourteenth Amendment by "legislation which alters [its] meaning." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The lower court cited a single case, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (principal opinion), in support of its conclusion that the Voting Rights Act may justify systematic voter inequality. JSA 65a–66a. In *Vera*, the Court assumed that Section 5 of the Voting Rights Act is a "compelling state interest" in redistricting. 517

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[19] Abrogated on other grounds by *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

U.S. at 982–83. But the Court has always insisted that "compliance with federal antidiscrimination laws" is not a compelling interest unless "reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921. *See also Vera*, 384 U.S. at 982–83 (rejecting Section 5 defense where state's actions were not reasonably necessary to avoid retrogression); *Alabama*, 135 S. Ct. at 1273 (remanding for consideration of Section 5 defense case where lower court's interpretation of Section 5 standard was incorrect).

By definition, any compelling interest in Section 5 compliance cannot extend to violations of constitutional guarantees—including the guarantee that the state will make a "good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. It was not "reasonably necessary under a constitutional reading and application" of Section 5 for the IRC to under-populate ability-to-elect districts. *Miller*, 515 U.S. at 921.

B. Section 5 Does Not Purport to Create a Preferred Class of Voters

It should come as no surprise, then, that nothing in the text or the Department of Justice enforcement regulations suggests that deliberately under-populating districts is "an appropriate tool" for Section 5 compliance. The IRC therefore cannot rely on Section 5 to justify the deviations in its plan.

Section 5 is violated if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] . . . in

that its members have *less* opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). This provision cannot be read to guarantee any voter or group of voters *more* opportunity than others to elect their preferred candidates. In fact, the text of Section 5 confirms that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). By necessary inference, nothing in the text of Section 5 purports to give any group of voters a right to greater representation than their proportion of the population.

The Department of Justice's enforcement guidance is not to the contrary. "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." Guidance Concerning Redistricting under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) ("DOJ Guidance"). The Department of Justice recognizes that "[t]here may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting . . . retrogression is unavoidable." DOJ Guidance at 7472.

True, the Department of Justice may have considered a plan with something less than "significantly greater overall population deviations" than the IRC's proposed plan as being "a reasonable alternative" to that plan. JSA 69a (quoting DOJ Guidance at 7472). But the DOJ Guidance here plainly refers to deviations "as may occur" under a plan "free from any taint of arbitrariness or discrimination,"

Roman, 377 U.S. at 710, not to a plan that "automatically discriminates in favor of certain districts," *Hadley*, 397 U.S. at 58. Nothing in the enforcement guidelines so much as suggests that under-populating districts is a "tool" for Voting Rights Act compliance. The DOJ Guidance does not and cannot purport to authorize intentional deviations in favor of any class of Arizona citizens.[20]

C. The Apparent Racial and Ethnic Underpinnings of the IRC's Classification of Districts for Over- and Under-Population Raise Additional Equal Protection Concerns

The IRC's invocation of the Voting Rights Act raises further concerns given the apparent racial and ethnic considerations involved. The district court found that "the predominant reason for the deviations" in the IRC's plan was the IRC's desire to comply with the Voting Rights Act. JSA 6a. That finding must mean that the characteristic used by the IRC to identify districts for over- and under-population was the race and ethnicity of the districts' citizens (or a certain proportion of their citizens). While the district court assumed that classifying the districts for unequal treatment because of their partisan tendencies would

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[20] The Arizona Secretary of State takes no position on the question whether Section 5 can remain a legitimate interest in light of *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). In the Secretary's view, neither Section 5 nor any other statute can provide a compelling interest for a state to discriminate against citizens by tampering with the relative weight of their votes. That is sufficient to resolve this case.

not be legitimate, classifying them as the IRC appears to have done is, if anything, more problematic.

The Court's "Fourteenth Amendment jurisprudence[] . . . always has reserved the strictest scrutiny for discrimination on the basis of race." *Shaw I*, 509 U.S. at 650 (1993). The Court addressed the question whether race and ethnicity are legitimate classifications by which to over- or under-weight citizens' votes over fifty years ago: "If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the [black] vote, none could successfully contend that that discrimination was allowable." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). There is no distinction between the use of race prohibited in *Gray* and the IRC's use of race in classifying districts for under-population. *Gray* left little room to doubt that the district court erred in approving that use:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—*whatever their race*, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 379 (emphasis added); *see also Reynolds*, 377 U.S. at 565–66.

Although *Gray* is more commonly remembered as the Court's first invocation of "one person, one vote," its rejection of race-based vote-dilution is critical because

it set forth the premise underlying that historic conclusion. Having observed that "none could successfully contend" that race (or sex) is a proper classification by which to distinguish citizens for unequal votes, the Court could proceed to conclude that "every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates." *Gray*, 372 U.S. at 379–80. Race has nothing to do with the proper weight to be accorded to an individual's vote, but neither does any other classification. And that "can mean only one thing—one person, one vote." 372 U.S. at 381. In that sense, the prohibition on race-based vote-dilution was antecedent to the broader one-person, one-vote rule, and the lower court was mistaken in declining to "import[]" the Court's racial-discrimination framework "into the one-person, one-vote context." JSA 64a. One person, one vote emerged from that framework. Basic equal protection principles demand nothing less than racial equality for all Arizona citizens as to the weight of their votes, if nothing else.[21] *Cf. Gaffney v. Cummings*, 412 U.S. 735, 751–52 (1973).

To be sure, legitimate, redistricting-specific uses of race were available to the IRC. "Race can be used, for

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[21] That conclusion follows from the Court's racial discrimination jurisprudence generally. *See, e.g., Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.); *University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.,); *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 347–48 (1960).

example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting." *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion). The allowance of race-conscious districting in this manner follows from the unique nature of drawing electoral districts. The process requires a state to group people together based on its perception of "actual shared interests." *Miller*, 515 U.S at 916). The state must make decisions about what "interests" are shared among what citizens, and the Court has rightly allowed it to use race as one factor among many in identifying those interests. *Shaw I*, 509 U.S. at 642 (stating that it was "wise" for litigants to concede that "race-conscious redistricting is not always unconstitutional"). It is only when race predominates over other redistricting criteria that the use of race triggers strict scrutiny. *Miller*, 515 U.S. at 916. Falling short of that, the state may weigh race in the balance in deciding how best to unite communities into electoral districts.

A second legitimate use of race in districting is in creating majority-minority districts under Section 2 of the Voting Rights Act and in avoiding retrogression in minority voting strength under Section 5 of the Voting Rights Act. Although such efforts have created disagreement on the Court about when strict scrutiny is triggered, *compare Bush v. Vera*, 517 U.S. 952, 962 (1996) (principal opinion) *with id.* at 996 (Kennedy, J., concurring) *and id.* at 999–1000 (Thomas, J., concurring in the judgment), the Court has signaled that drawing majority-minority districts is, at least, a legitimate government interest when the use of race is narrowly tailored "under a constitutional reading and application" of the Voting Rights Act. *Miller*, 515 U.S. at 921. Likewise, the Court has assumed that

compliance with the non-retrogression command of Section 5 is a compelling government interest, as long as the use of race is narrowly tailored. *Vera*, 517 U.S. at 977, 982–83; *see also Alabama*, 135 S. Ct. at 1274.

The IRC's decision to under- and over-populate districts was neither necessary nor relevant to either legitimate use of race. The IRC departed from the use of race as one factor for identifying "actual shared interests" because enhancing the voting strength of all residents of minority districts does not in any way unite individuals or communities based upon their commonalities. In fact, the record evidence shows that the IRC's alterations removed *Hispanic* residents from Hispanic districts in order to under-populate those districts. JSA 165a–167a. That course of action did not safeguard or advance the political cohesion of Arizona's minority communities.

Nor was there any need for the IRC to manipulate population deviations to draw Voting Rights Act districts. Creating a Voting Rights Act district involves drawing lines around a certain percentage of minority voters (typically, a politically cohesive community) to ensure that the minority community is competitive in elections in that district. It does not involve affording residents of a given district (*all* residents, minority or not) enhanced voting strength as compared with residents of other districts. In creating a "majority-minority" district (the *only* means for Section 2 compliance) the state ensures that "a minority group composes a numerical, working majority of the voting-age population" in the district. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). In drawing an "influence" or "crossover" district (which may be legitimate tools for

Section 5 compliance),[22] the state draws a sufficient percentage of minority voters into the district to ensure a perceived optimal level of competitiveness.[23] *See id.* Attaining a certain percentage of minority voters in the district is the goal, and a state does not need the "tool" of intentional under-population to attain it.[24]

The IRC did not advance its interest in drawing Voting Rights Act districts by under-populating them as a class. If the districts needed to be "strengthened," the IRC should have increased the percentage of

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[22] The third question presented to this Court on appeal concerned whether influence or crossover districts are permissible avenues for Section 5 compliance—a question left open in *Alabama*, 135 S. Ct. at 1273. The Court has declined to hear argument on that question, and the Secretary does not, in any event, have a view on the issue.

[23] An "influence district" exists where a minority group is sufficiently large to "influence the outcome of an election" in a given district. *Bartlett*, 556 U.S. at 13. In a "crossover district," "the minority population . . . is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.*

[24] The Department of Justice's objections to the IRC's 2001 plan reflected that analysis. The Department of Justice identified several districts in the benchmark plan with high percentages of minority voting age population. It then analyzed the proposed replacement districts and observed that they had substantially lower percentages of minority voting age population. After reviewing voting patterns, the Department of Justice confirmed that the replacement districts retrogressed from the benchmark plan. The deviation of the total population from the ideal in the districts of concern had no bearing on the analysis. *See* Letter from Ralph F. Boyd, *supra* note 2.

minority voters within the districts it perceived to be weak. But many of the IRC's alterations *reduced* the districts' percentage of Hispanic voting age population. JSA 165–167a. *Contrast Beer v. United States*, 425 U.S. 130, 142 (1976) (looking to percentage voting-age population in minority districts for retrogression analysis); *Alabama*, 135 S. Ct. at 1274 (same). The result of consciously under-populating these districts was not to ensure competitiveness within given districts, but to enhance and dilute the weight of Arizona citizens' votes across the state, according to a racial and ethnic classification. The Court has never recognized this use of race as being permissible, and decades-old precedent indicates that it is not.

The district court had a very different concept of legitimate racial-conscious districting. It opined that states may "do more than the bare minimum to avoid retrogression," that they may "overshoot the mark," and that they may "aim higher than might actually be necessary" for Voting Rights Act compliance. JSA 22a–23. This Court has taken a far more cautionary approach in this sensitive area: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. This standard does not require that a state "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Alabama*, 135 S. Ct. at 1273. But it does require that a state make the appropriate considerations—such as "what percentage reduction" in voting strength in a given district might be "retrogressive"—and not shoot for a goal entirely unrelated to the Voting Rights Act—such as tampering

with the weight of citizens' votes. The IRC's race-based decisions were well off the mark, had little if any relation to preserving the ability of minority communities to elect their preferred candidates, and were impermissible under the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed, and the case remanded for the lower court to afford relief.

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